No. 13685

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

BRIEF OF APPELLANT

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FRAYN PRINTING COMPANY

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ISSUES INVOLVED

The lower court ruled defendant's mining claim invalid in so far as it overlapped a 37.5 acre tract that was withdrawn from mineral entry by public land order some two months later, and enjoined defendant from using or developing his claim. Two primary questions are raised by defendane's appeal:

1. Did Public Land Order 734 of the Secretary of the Interior, published July 26, 1951, relate back to February 9, 1951 so as to appropriate the land as of that date and invalidate defendant's mineral

entry on June 21, 1951 on what was then unappropriated mineral land, when Forest Service regulations state that such order is not effective until it is published and the order itself was subject to existing rights?

2. Was a document entitled "Correction Memorandum No. 11" signed by the Chief Forester in connection with and as part of the administrative procedure leading up to Public Land Order 734 a permit under a statute which neither plaintiff nor defendant relied upon or mentioned at the trial and which is inconsistent with a withdrawal by public land order, when the memorandum was not in the form of a permit nor referred to as a permit nor issued to anyone?

STATEMENT OF THE PLEADINGS

Plaintiff, the United States of America, instituted this action by a complaint seeking a temporary and permanent injunction restraining the defendant, H. F. Schaub, from using occupying or interfering with a certain 37.5 acre tract of land near Ketchikan, Revillagigedo Island, Alaska, and a determination that defendant's claim of right, title and interest in such tract was invalid (Tr. 10). The tract involved lies along Whipple Creek and will sometimes be so described herein.

Paragraph III of the complaint described the tract by metes and bounds and alleged it to be

part of the Tongass National Forest (Tr. 3-4). Defendant denied that plaintiff owned all of such land (Tr. 28).

Paragraph IV of the complaint alleged that the 37.5 acre tract was part of a public service site set apart and appropriated by the Regional Forester of the U. S. Forest Service on September 3, 1940, by various acts pursuant to specified regulations (Tr. 4). Defendant denied that such acts of the Forester appropriated the tract (Tr. 28).

Paragraph V of the complaint alleged that the 37.5 acre tract was set apart, appropriated and reserved for the use of the Bureau of Public Roads by the Regional Forester on February 9, 1951 (Tr. 4-5). Defendant admitted issuance of "Correction Memorandum No. 11" but denied that any authority existed for its issuance (Tr. 28).

Paragraph VI of the complaint alleged that the Secretary of the Interior by Public Land Order 734, dated July 20, 1951 and published July 26, 1951, in 16 Fed. Reg. 7329, withdrew the land from mineral entry (Tr. 5). Defendant admitted issuance of the order, but alleged that the withdrawal was not effective until July 26, 1951, and was "subject to valid existing rights" (Tr. 28).

Paragraph VII of the complaint alleged that the Forest Service and Bureau of Public Roads had appropriated the 37.5 acre tract by prospecting, searching for, surveying, finding, discovering,

mining and removing large quantities of sand and gravel between 1934 and 1951 (Tr. 5-6). Defendant admitted that gravel had been removed intermittently by private contractors from the creek bed running through the tract (Tr. 28).

Paragraph VIII of the complaint alleged that defendant went upon the 37.5 acre tract on or about June 21, 1951 and unlawfully posted a notice of claim, barred others from entry, moved improvements thereon and removed timber, overburden, sand, gravel and stone (Tr. 6). Defendant denied these allegations except admitting that he made a valid mineral entry upon a portion of the 37.5 acre tract on June 21, 1951 (Tr. 28).

Paragraphs IX, X and XII of the complaint alleged that defendant prevented plaintiff from using the 37.5 acre tract and had removed timber, overburden, stone and gravel, that defendant's acts constituted interference with the United States in its administration of the Tongass National Forest and that an injunction was necessary to restrain the defendant from such acts (Tr. 7-9). Defendant admitted these allegations (except as to removal of timber, overburden, sand and gravel); but alleged that all of such acts were upon land which he had made a valid mineral entry (Tr. 28-29).

Paragraph XI of the complaint alleged that plaintiff had made a valid contract for the construction of the North Tongass Highway, Revil-

lagigedo Island, Alaska, which provided that borrow material could be obtained from the 37.5 acre tract (Tr. 8). Defendant admitted these allegations, but alleged that such contract was made by plaintiff with full knowledge that defendant had made a mineral entry upon a portion of such 37.5 acre tract and was in actual possession thereof (Tr. 29).

Defendant alleged as affirmative defenses:

1. That there is no legal authority for the Regional Forester or employee of the Department of Agriculture or of the Bureau of Public Roads or Department of Commerce to designate land within a National Forest for mineral development or use so as to exclude mineral entry (Tr. 29-30).

2. That the only use of the land had been removal by private contractors of sand and gravel partly in areas not claimed by defendant; that the land was subject to mineral entry on June 21, 1951, and that the Forest Service has no right to appropriate or withdraw mineral lands within a National Forest (Tr. 30).

3. That defendant made and duly perfected a valid mineral entry June 21, 1951 on property described by metes and bounds, a portion of which was within the 37.5 acre tract, prior to the time any part of the 37.5 acre tract was withdrawn from mineral entry (Tr. 31).

Defendant submitted written interrogatories

prior to answering, paragraph 5 of which requested as follows:

> "5. Please specify and identify under which law of the United States or Departmental regulation by which the Regional Forester of the U. S. Forest Service at Juneau, Alaska, on February 9, 1951 made the appropriation claimed in paragraph 5 of the complaint." (Tr. 19)

The answer of the plaintiff to this interrogatory was as follows:

> "Answer: Act of Congress dated June 4, 1897, 30 Stat. 35. Act of Congress dated February 1, 1905, 33 Stat. 628." (Tr. 23)

The relevant portion of the first of these acts is now codified at 16 U.S.C. § 477, and provides:

> "The Secretary of Agriculture may permit, under regulations to be prescribed by him, the use of timber and stone found upon national forests, free of charge, by bona fide settlers, miners, residents and prospectors for minerals, for firewood, fencing, building, mining, prospecting and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such national forests may be located."

The second statute referred to in the answer to the interrogatory now appears at 16 U.S.C. § 472 (33 Stat. 628), which provides as follows:

> "The Secretary of the Department of Agriculture shall execute or cause to be executed all laws affecting public lands reserved under the provisions of section 471 of this title, or sec-

> tions supplemental to and amendatory thereof, subject to the provisions for national forests established under subdivision (b) of section 471 of this title, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands. Feb. 1, 1905, c. 288, § 1, 33 Stat. 628."

In response to other interrogatories regarding the statutory authority for the various acts of the U. S. Forest Service and Bureau of Public Roads claimed to be an appropriation, the plaintiff several times repeated the same statutes (Interrogatory 2 and 8; Tr. 22 and 24) and added a third, the Federal Highway Act, 42 Stat. 221, as amended, 23 U.S.C. § 1, et seq. (42 Stat. 212). (Interrogatory 8; Tr. 24). Section 18 of that act provides:

> "If the Secretary of Agriculture determines that any part of the public lands or reservations of the United States is reasonably necessary for the right of way of any highway or forest road or as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands or reservations, the Secretary of Agriculture shall file with the Secretary of the department supervising the administration of such land or reservation a map showing the portion of such lands or reservations which it is desired to appropriate.
>
> "If within a period of four months after such filing the said Secretary shall not have certified to the Secretary of Agriculture that the proposed appropriation of such land or material is contrary to the public interest or incon-

sistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department for such purposes and subject to the conditions so specified.

"If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary of Agriculture, and such lands or materials shall immediately revert to the control of the Secretary of the department from which they have been appropriated."

a. *Jurisdiction of the District Court*

The District Court for the Territory of Alaska had jurisdiction of the action under the provisions of 48 U.S.C. § 101, 31 Stat. 322 as amended, and 28 U.S.C. § 1344, 62 Stat. 933.

b. *Jurisdiction of this Court*

This Court has jurisdiction of the appeal under the provision of 28 U.S.C. § 1291, 62 Stat. 929 and 28 U.S.C. § 1294 (2), 62 Stat. 930.

STATEMENT OF THE CASE

a. *Defendant's Mining Location*

Defendant H. F. Schaub commenced operation of a sand, gravel and prefabricated concrete products plant in Ketchikan, in April 1950 (Tr. 290). He has been in the sand and gravel business since 1940 (Tr.

289). His gravel supply at Ketchikan was under tidelands which he subleased from Alaska Concrete Products Corporation, subject to the right of an adjacent property owner to erect a pier. Erection of the pier would have put the defendant out of business (Tr. 291-292). Defendant invested $10,000 in a concrete block plant, but it was "practically idle" because the sand and gravel was stained and concrete block made from it was unmarketable (Tr. 293, 307). At the time of trial defendant had been stopped from operating with the beach gravel by the Bureau of Land Management which claimed ownership of the sand and gravel and notified defendant that he was trespassing (Tr. 292).

In June 1951 defendant and a witness went to a point in Whipple Creek about fifteen hundred feet from the road so as not to interfere with possible road construction and made his discovery location on an ample deposit of gravel (Tr. 298). The discovery point was not within the 37.5 acre tract (Tr. 157-518), but most of the claim fell within the area later withdrawn by public land order. Two days later, on June 21, 1951, defendant returned and placed corner stakes and brushed out the lines (Tr. 299-300). After completing the boundary lines and corner statues and posting notice of the claim, defendant filed a notice of location in the Recorder's Office on June 27, 1951 (Tr. 300, Def. Ex. A). Defendant located the claim openly and peaceably

(Finding of Fact IV, Tr. 59). The gravel at this location was tested by a laboratory in Seattle and it meets standard specifications and will make a good concrete block (Tr. 292-293).

The defendant owns a gravel mining claim at Boca de Quadra on Martin Arm (Tr. 304). Gravel from that claim is of satisfactory quality (Tr. 307), but cannot be used at Ketchikan because the cost of transportation is prohibitive (Tr. 311). The defendant knew in 1940 (Tr. 296) that there was a gravel deposit on the tract, but was not then engaged in the gravel business at Ketchikan. Large quantities of gravel have always been exposed over its entire length (Tr. 302, 219).

b. *Correction Memorandum No.* 11

A plat of the 37.5 acre tract was forwarded to the Forest Service on January 31, 1951 by the Bureau of Public Roads with the "request that it be set aside formally for gravel purposes." (Tr. 137, 253). The Bureau of Public Roads had prepared the plat of the 37.5 acre tract by projecting lines from existing surveys and calculating the outside boundaries (Tr. 246, 268). No boundaries were ever marked or surveyed on the ground nor were the corners staked (Tr. 246, 268).

As a result the Regional Forester signed a document entitled "Correction Memorandum No. 11" at Juneau about February 7, 1951, which was placed

in the land records of the Southern Division of the Tongass National Forest two days later on February 9, 1951 (Tr. 182-183). That document described the 37.5 acre tract by metes and bounds in accordance with the plat and stated that the tract was "hereby reserved for the use of the Bureau of Public Roads as a source of road building material" (Tr. 11). Simultaneously and as a part of the same transaction as the issuance of the Correction Memorandum (Tr. 182), the Regional Forester sent a letter dated February 7, 1951 to the Chief of the U. S. Forest Service, enclosing a form letter to the Director of the Bureau of Land Management from the Chief of the U. S. Forest Service (Tr. 181-183, 273-274). This letter was part of the Forest Service custom and procedure to obtain formal withdrawal by the Secretary of the Interior (Tr. 271). The enclosed letter from the Chief of the Forest Service was forwarded to the Bureau of Land Management between February 13 and March 8, 1951 (Tr. 276) and requested that

> "The land shall be subject to leasing under the mineral leasing laws for their oil and gas deposits provided no part of the surface of the land shall be used in connection with prospecting, mining and removal of the oil and gas." (Tr. 76, 273-274)

The description of the tract to be withdrawn as contained in that letter (Tr. 77) is slightly different than that contained in Correction Memorandum No.

11 (Tr. 11), the first and last courses of the former having been changed so as to enclose a smaller area, and erroneously designating the fourth course as S. 46″ 30′ E. instead of S. 46″ 30′ W.

These preliminary steps did not result in any withdrawal until July 20, 1951 when the Secretary of the Interior signed an order declaring that the tract

> "Subject to valid existing right . . . is hereby withdrawn from all forms of appropriation under the public land laws, including the mining laws but not the mineral leasing laws . . ." (Public Land Order 734, p 48, infra)

The order was published in the Federal Register on July 26, 1951 and became effective on that date.

The Secretary of the Interior withdrew the tract under a different description than that contained in either Correction Memorandum No. 11 or the formal request for withdrawal by the Chief of the U. S. Forest Service, being smaller in area than the former and correcting errors in the latter. The order ignored the request that the land be withdrawn from the operation of the mineral leasing laws except to a limited extent and left the tract subject to the full operation of such laws (See p 48, infra).

Defendant offered the letters to show that Correction Memorandum No. 11 was only an administrative step leading to a withdrawal by Public Land Order, and that the Secretary of the Interior exer-

cised his own independent judgment in making that withdrawal.

c. *Use and Possession Claimed by Plaintiff as a Withdrawal*

During 1942 the U. S. Coast Guard removed three or four hundred yards of gravel from the Whipple Creek area with the consent of the Forest Service for road purposes (Tr. 128, 129). During 1948-1949 Berg Construction Company removed 15,369 yards of borrow fill and surfacing (Tr. 131). Another contractor removed 6,654 yards in 1949 (Tr. 135). Mr. Berg, under another contract, removed 8,215 yards starting June 28, 1950 and continuing into December 1950 (Tr. 135). All of these contractors were constructing Forest Service roads under contract with the Forest Service.

These contractors bulldozed (Tr. 202) a roadway approximately 1000 feet long (Tr. 146). The supervisor of the Southern Division of the Tongass National Forest, Mr. Archibold, (Tr. 123) testified that

> ". . . it was a very simple operation to make a road with a bulldozer that a truck could go on. All they would have to do is level off the ground. It was all hard gravel so it was no problem at all. You can go any place on that north side of the stream with a very small amount of work to make a good road even after the stream has had its high-water stages." (Tr. 202)

The contract required the contractor to construct the road "without remuneration for such things as his needs require." (Tr. 161).

A contractor built a log loading ramp in 1949 (Tr. 146, 207). Mr. Archibold testified that the ramp was left there for the use of the Forest Service and the Bureau of Public Roads at the request of the Forest Service (Tr. 147), but admitted that the Forest Service did not maintain it, and that he did not know that anyone ever used it after the contractor left (Tr. 208).

There was no evidence that anyone used the tract after the conclusion of the last Berg contract in December of 1950 (Tr. 135) and before June 21, 1951, the date defendant made his mineral entry (Tr. 299-300).

Mr. Archibold testified that the "developed" areas resulting from these operations included the stream bed as it fluctuated back and forth (Tr. 176). The contractors had worked mainly in the bed of the stream. Gravel washed down the hill and filled up the pits as they were dug (Tr. 155).

d. *Judgment of the Lower Court*

The judgment of the lower court permanently enjoined defendant from barricading plaintiff's right of way to the 37.5 acre tract described by Correction Memorandum No. 11 and from using or occupying such land or mining and removing sand

and gravel from the tract and required defendant to remove any barricade he had placed upon the tract and other property and equipment belonging to him. The judgment recited that defendant's mining claim "be and is hereby declared null and void insofar as his claim of right, title and interest therein embraces or constitutes a part of the said 37.5 acres of land." (Tr. 66-68).

Judgment was entered on May 17, 1952. Defendant moved for judgment notwithstanding the decision of the court and for a new trial (Tr. 54), both of which motions were denied on July 2, 1952 (Tr. 17-18). This appeal followed.

SPECIFICATIONS OF ERROR

The District Court erred as follows:

1. Including in Finding of Fact VI the statement that the Regional Forester "issued to the Bureau of Public Roads Correction Memorandum No. 11" (Tr. 60).

2. In making Findings of Fact V, VII and VIII (Tr. 61).

3. In making Conclusions of Law I, II, III, IV, V VI (Tr. 63-64).

4. In entering judgment in favor of plaintiff.

5. In excluding from evidence the following:

(a) letter dated February 7, 1951 by Frank Heintzelman to the Chief, U. S. Forest Service,

Washington, D. C., and enclosure. (Identified, Tr. 181, 273-274; Offered, Tr. 275; Refused, Tr. 277);

(b) U. S. Forest Service Regulation U-3 (Identified, Tr. 193; Offered, Tr. 195, 278; Refused Tr. 197, 278);

(c) Circular No. U-220, U. S. Department of Agriculture, dated December 16, 1949 (Identified, Tr. 197; Offered, Tr. 197, 278; Refused Tr. 197, 278).

6. In denying defendant's motion for a new trial.

ARGUMENT

I. *Public Land Order 734 was the final act appropriating the tract in question under well established law, but was not effective until July 26, 1951. It did not and could not relate back to prior administrative procedure leading up to its issuance so as to deprive appellant of a mineral claim located upon unappropriated public land two months earlier. Forest Service regulations and the order itself expressly state that such an order could not affect appellant's vested rights.*

The lower court erred in conclusion of Law IV in holding that Public Land Order 734 "related back" to the "formal written request for withdrawal by the Forest Service." (Tr. 64)

Article IV, § 3, cl. 2 of the Constitution provides:

> "The Congress shall have power to dispose of and made all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *"

It has been uniformly held that the power of Congress is exclusive, and that neither the courts, the

States, nor executive agencies may proceed contrary to or in excess of authority of Act of Congress. *U. S. v. Fitzgerald,* 15 Pet. 407; *U. S. v. Gratiot,* 14 Pet. 537; *U. S. v. State of California,* 332 U. S. 19, 67 S.Ct. 1658 (1947).

In *U. S. v. Fitzgerald,* 15 Pet. 407, 421 (1841), the Supreme Court first held that acceptance of a Congressional grant by a qualified settler was effective notwithstanding various executive acts claimed to constitute a withdrawal. The rule has been unquestioned in subsequent cases for the last 112 years, and is illustrative of the strictness with which the courts will scrutinize claims that defeat the acquisition of rights in public lands under authority of Congress.

In the *Fitzgerald* case, the United States brought an action to recover 160 acres of land claimed under the pre-emption laws by the defendant. The defendant had been appointed an Inspector of Customs in 1833 and had been put into possession of the tract in question by the Collector of Customs. The house and grounds had been occupied by former government officers exercising the same functions as defendant. The defendant was not required to live at that spot, nor was the government required to furnish him any accommodations. The defendant applied for the purchase of the land on the last effective day of the law, but patent was refused because the Secretary of the Treasury di-

rected that it be reserved from sale for use by the custom house (for which purpose it had been used for many years prior to the defendant's settlement upon it). Congress had appropriated funds for the purpose of building a lighthouse in the area in 1831. It was claimed that the tract in question was the only spot where one could be put. Despite the denial of his entry, defendant remained in possession of the tract "which had become valuable for the lighthouse being erected upon it."

The Supreme Court affirmed a decree quieting title in the defendant, saying:

> "It cannot be pretended that the land in controversy was reserved from sale by an act of Congress or by order of the President, unless the direction of the Secretary of the Treasury, to reserve it from sale several months after it had been actually sold and paid for, could amount to such an order. As no reservation or appropriation of the land made after the right of the defendants accrued under the Act of the 19th of June, 1834, could defeat that right, it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation.
>
> ". . . No appropriation of public land can be made for any purpose but by authority of Congress. By the third section of the fourth article of the Constitution of the United States, power is given to Congress to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States. As no such authority has been shown to authorize the collector at New Orleans to appropriate this land to any use whatever, it is wholly useless to inquire whether his

acts, if they had been authorized by law, would have amounted to an appropriation.

"* * * If the act had directed that the light-house should be built on this particular tract according to the decision of this court in the case of Wilcox v. Jackson (13 Peters 498), it would have been such an appropriation within the meaning of the Act of the 29th of May, 1830, as would have deprived the defendants of their right of pre-emption. But the same plat shows that the light-house was built on Wagner's Island, which appears to be at the mouth of the southwest pass, and not included with this or either of the other tracts of land exhibited on the plat. From this examination of the case, it is clear that the land in controversy was neither reserved from sale nor appropriated to any purpose whatever."

United States v. Tichenor, 12 Fed. 415 held that a memorandum by the President was only a precautionary note and was not a withdrawal where there was no specific description or designation of a particular area in the public land records. It also held that occupation of a particular tract of public land as a military tract did not withdraw the land from operation of the public land laws.

United States v McGraw, 12 Fed. 449 (1882) held that an order of the Secretary of War purporting to make a military post "permanent according to previous action" was void insofar as it affected lands previously entered.

Northern Pac. Ry. Co. v Mitchell, 208 Fed. 469 held that neither a recommendation that land be withdrawn for an Indian Reservation by an in-

spector of the Indian Department, nor an order by the Commanding General of the Indian Department nor recommendations for withdrawal by the Secretary of the Interior to Congress withdrew the land. It was also held beyond the power of the President to withdraw the land so as to affect rights acquired several months earlier by a railroad.

Presidential power to withdraw lands from the disposal contemplated by Congress under the mineral laws or other public land laws was unquestioned, until 1910, when vast tracts of oil lands were withdrawn from mineral entry. Shortly afterwards and as a result of the controversy that ensued, Congress granted limited powers to the President to withdraw lands from entry under the public land laws and required that annual reports of such withdrawals be submitted to it. 43 U.S.C. § 141 et seq., 36 Stat. 847. (See *United States v. Midwest Oil Co.,* 236 U.S. 459, 35 S.Ct. 309)

The acting solicitor of the Department of the Interior in an opinion entitled *Authority of the Secretary of the Interior to Withdraw Public Lands,* 57 L.D. 331 suggested in 1941 that the president delegate his statutory and implied authority to withdraw land to the Secretary of the Interior.

Executive Order 9337, effective April 26, 1943 (p 49, infra) was thereupon issued delegating to the Secretary of the Interior the President's statutory

and implied authority, if any, to appropriate or withdraw public land.

Pursuant to Executive Order 9337, Public Land Order No. 734, relied upon by plaintiff in the case at bar, was published July 26, 1951 in the Federal Register. That order withdrew the 37.5 acre tract "from all forms of appropriation under the public land laws, including the mining laws, *but not the mineral leasing laws*" (italics added). The withdrawal order by its terms was "subject to valid existing rights."

Public Land Order 734 was a result of a "formal request in writing" by the Regional Forester made on February 7, 1951 simultaneously with his issuance of Correction Memorandum No. 11 and as part of the same transaction in accordance with the custom and procedure of the Forest Service (Tr. 182, 271). Such a request for a withdrawal does not in itself withdraw the land under Forest Service Regulations U-3 and Circular Letter U-220.

Regulation U-3 (Tr. 92) described the administrative steps leading up to a withdrawal by public land order and states that such an order is "not effective until published in the Federal Register.", i.e. two months after defendant's mineral entry in the case at bar.

Circular Letter U-220 (Tr. 78-79) is a procedural regulation which itself recognized that a formal order under Executive Order 9337 is necessary to

withdraw an undeveloped area such as the 37.5 acre tract here in question:

> "The Solicitor of this Department believes that developed administrative sites and public service areas are protected against location and entry under the U. S. Mining Laws but is very doubtful whether buffer zones around such areas or potential but undeveloped areas are protected. The Bureau of Land Management has some doubts as to whether even a developed area can be protected from mining claims unless withdrawn under Executive Order No. 9337 or by legislation." (Tr. 78)

Appellant conceded that the formal order of withdrawal, Public Land Order No. 734, was authorized, lawful and effective on July 26, 1951. But appellant maintained that the procedure adopted by the Forest Service could not affect his rights, nor could the order itself relate back to invalidate his mineral entry of June 21, 1951. On that date appellant acquired a vested property interest in the lands under the mineral laws which could not be destroyed by executive action.

A mineral location on unappropriated public land gives the locator a property right. Thus, in *Belk v. Meagher,* 104 U. S. 279 (1881), the court said (at page 283):

> "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent."

In *Gwillim v. Donnellan,* 115 U.S. 45, 49, the court held:

> "A valid location of mineral lands, made and kept in accordance with statute, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."

As pointed out in *Van Ness v. Rooney,* 160 Cal. 131, 116 Pac. 392, error dismissed 231 U.S. 737, 34 S.Ct. 316:

> "The moment the locator discovered a valuable mineral deposit on the lands and perfected his location in accordance with law, the power of the United States government to deprive him of the exclusive right to the possession of the located claim was gone * * *."

As early as 1881 the Attorney General of the United States had ruled that there could be no relation back of an admittedly valid presidential withdrawal so as to restrict the possessary rights of miners or to prevent such miners acquiring patents where their claims were located "several months previous" to establishment of a military post. 17 Op. Atty. Gen. 230 (1881) entitled "Reservation of Land for Public Purposes," states in part:

> "Under the laws providing for the exploration, occupation and disposal of mineral lands, the locator, so long as he complies with the conditions imposed by those laws, is clothed with a possessary right, which entitled him to the exclusive right of possession and enjoyment of

all the surface included within the lines of his location.

* * *

"* * * The rights thus recognized by Congress are property of great value. Very large amounts are invested in mines, the ownership of which rests solely upon the possessary right referred to.

"It seems to me that where such right has attached to mineral land in favor of the locator of a mining claim, the land during the continuance of the claim (i.e., so long as it is maintained in accordance with law) becomes by force of the mining laws appropriated to a specific purpose, namely, the development and working of the mine located; and, unless Congress otherwise provides, it can not, while that right exists, notwithstanding the title thereto remains in the Government, be set apart by the Executive for public uses.

Similarly, in *United States v. Fitzgerald* (supra, p 18) the court said:

"As no reservation or appropriation of the land made after the right of the defendants accrued under the Act of the 19th of June, 1834, could defeat that right, it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation."

And in *United States v. McGraw* (12 Fed. 449), the court held that an order making a military post "permanent according to previous action" could not affect defendant's rights "because they were purchased [entered] before the order was made." Again in *Northern Pac. Ry. Co. v. Mitchell* (208 Fed. 469)

a presidential order of withdrawal did not divest any title because "it was without the power of the President to divest that title or affect the status of the land in any way." In *United States v. Tichenor,* 12 Fed. 415) a withdrawal did not relate back to a preliminary notation by the President himself. See also *Nygard v. Dickinson,* 97 F. (2d) 53 (C.C.A. 9th); *U. S. v. Deasy,* 24 F. (2d) 108 (D.C. Idaho); *Van Ness v. Rooney,* 160 Cal. 131, 116 Pac. 392, error dismissed, 231 U.S. 737, 34 S.Ct. 316.

These rules are particularly applicable to the case at bar since Regulation U-3 itself states that Public Land Order 734 was not effective until published on July 26, 1951, two months after defendant's mineral entry, and the order itself was "subject to valid existing rights."

A mineral location could not be sold, improved or developed upon what appears to be a good title if the law permits an executive withdrawal to relate back to some prior administrative act by a subordinate official.

II.

a. *Correction Memorandum No.* 11 *was not a special use permit under* 48 *U.S.C.* § 341 (62 *Stat.* 100).

The second ground for the lower court's decision was that "Correction Memorandum No. 11" was a permit which itself withdraw the land from mineral entry prior to defendant's location.

1. *The lower court recognized it was not a permit by applying the fiction of "relation back."*

The lower court implicitly recognized the fact that Correction Memorandum No. 11 was but a step leading up to the withdrawal of the 37.5 acre tract by Public Land Order 734 of the Secretary of the Interior by its Conclusion of Law IV (Tr. 64). The Court there held that the latter withdrawal "related back to said formal written request for withdrawal" (Tr. 75-77). This formal written request for withdrawal was concededly part of the same transaction as the issuance of Correction Memorandum No. 11 in accordance with Forest Service custom and procedure (Tr. 182, 271).

The lower court's conclusion of law thus points out the fact that Correction Memorandum No. 11 was not in itself a permit withdrawing the land from mineral entry. If it was, then no further action was necessary, nor was there any need to apply the legal fiction of "relation back."

2. *The application for Public Land Order* 734 *and the order itself are inconsistent with the theory of a permit.*

48 U.S.C. § 341 (62 Stat. 100) provides that, after issuance of a permit

> "the land therein described shall not be subject to location, entry or appropriation, under the public land laws or mining laws, *or to disposition under the mineral leasing laws.*" (italics added)

Despite this, the formal written request for withdrawal made as part of the same transaction as issuance of Correction Memorandum No. 11 requested that

> "The said lands shall be subject to leasing under the mineral leasing laws for their oil and gas deposits, provided that no part of the surface of the lands shall be used in connection with prospecting, mining and removal of oil and gas." (Tr. 76)

The Secretary of the Interior made no such reservation. Public Land Order 734 (p 48, infra) withdrew the lands

> "from all forms of appropriation under the public land laws, including the mining laws *but not the mineral leasing laws,* * * *" (italics added)

This order, incidentally, shows that the Secretary of the Interior exercised independent judgment as to the terms of the withdrawal and as to its extent, and hence confirms the view that such orders do not relate back to an earlier and different administrative request. It is even more important, however, to show that Correction Memorandum No. 11 was not a permit under 48 U.S.C. § 341 (62 Stat. 100). If the memorandum had been a permit under such statute there would have been no occasion for the Forest Service to request its withdrawal from even a limited operation of the Mineral Leasing Act, nor could the Secretary of the Interior modify that

request so as to leave the land subject to the full operation of that law.

Under the mineral leasing law the Secretary of Agriculture has no power to lease mineral lands in National Forests or dispose of such lands by permit, Opinion 5081 of the Solicitor of the Department of Agriculture, December 7, 1944 (quoted in full Tr. 33-46). The committee report on 16 U.S.C. § 508 (64 Stat. 311) reported in 2 U.S. Code Cong. Serv., 1950, p. 2622, refers to the opinion as the basis for passing a special statute permitting the development of gravel deposits in the Chippewa National Forest under lease by the Secretary of the Interior.

If the land is subject to the Mineral Leasing Laws, however, defendant might salvage part of his $10,000 investment in his concrete block plant (Tr. 292) by obtaining a lease of the sand and gravel deposits—even if his mining claim should be set aside. It appears that there is no other concrete plant in Ketchikan (Tr. 290) and the defendant has no source of supply for his present plant (Tr. 292). Unless defendant's mining claim is allowed, or the Secretary of the Interior has power to lease the Whipple Creek sand and gravel deposit on terms sufficient to interest a private investor, there is no way in which Ketchikan can obtain its usual requirements of concrete products at reasonable cost. If Correction Memorandum No. 11 is a

permit under 48 U.S.C. § 341 (62 Stat. 100) then neither defendant nor the Town of Ketchikan may look to Whipple Creek for future needs.

3. *No permit can be issued for development of mineral resources subject to mineral entry or the mineral leasing laws.*

Correction Memorandum No. 11, as shown by the evidence, was for the purpose of allowing the Forest Service and the Bureau of Public Roads supervising or themselves extracting, processing and using sand and gravel (Tr. 228-230) — in short, to develop the 37.5 acre tract as a mine. It is clear that the Secretary of Agriculture had no such power prior to enactment of 48 U.S.C. § 341 (62 Stat. 100) and equally clear that the statute did not change the long existing rule to that effect. Of course, the Secretary of Agriculture may administratively permit the use of resources in National Forests. He even has the power to suffer trespasses. The exercise of such power does not foreclose mineral entry upon the lands, however.

The Act of June 4, 1897 (16 U.S.C. § 482, 30 Stat. 11) establishing National Forests under the jurisdiction of the Secretary of the Interior provided that:

> "any minerals in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall

> continue to be subject to such location and entry, nothwithstanding any provisions herein contained."

When in 1905 the management of the forest reserves was transferred from the Secretary of the Interior to the Secretary of Agriculture by Act of February 1, 1905 (16 U.S.C. § 472, 33 Stat. 628), Congress expressly retained in the Secretary of the Interior all laws affecting:

> *"The surveying, prospecting, locating, appropriating,* entering, relinquishing, reconveying, certifying, or patenting of any of such lands." (Italics added.)

Under these statutes, regulations of the Secretary of Interior have provided for over fifty years that National Forest lands are open to location in the usual manner. 31 L.D. 453, 493 (1901), 43 C.F.R. 185.33.

So stringent has the rule been that the Secretary of Agriculture has no power to classify forest land for public use and convenience or to issue permits so as to bar mineral entry that at least nine separate statutes have been passed limiting the surface use of mining claims or preventing the location of mining claims in specific areas of National Forests:

> (47 State. 771) 16 U.S.C. § 482 a; (48 Stat. 773) 16 U.S.C. § 482 b-d; (53 Stat. 817) 16 U.S.C. § 482 e-g; (54 Stat. 52) 16 U.S.C. § 482 h; (60 Stat. 254) 16 U.S.C. § 482 h(1)-(3); (56

Stat. 311) 16 U.S.C. § 482 i; (63 Stat. 168) 16 U.S.C. § 482 j-1; (63 Stat. 75) 16 U.S.C. § 482 n; and (65 Stat. 118) 16 U.S.C. § o-q.

Most of these statutes covered roadside areas and their purpose as shown by committee reports was to prevent the surface use of mineral locations which might interfere with scenic beauties and public recreation along highways.

The Solicitor of the Department of Agriculture in 1944 pointed out in an opinion to the Chief of the Forest Service (Opinion No. 5081) (Tr. 33, 39-40):

> "It is apparent from a review of the objects of the national forests that they can be fully effectuated through an administration of the occupancy and use of the surface of national forest lands without the development of the mineral resources. Ops. Sol. 264 and 1866 (O.S.). Development of mineral resources may be of benefit to the United States. However, the question is one of power, and that must come from Congress and is not to be inferred from the fact that the proposed action would be highly beneficial to the United States. 20 Ops. Att'y Gen. 93 (1891)."

See also *United States v. Nebo Oil Co.*, 90 F. Supp. 73 (D.C. La.)

The purpose of 48 U.S.C. § 341 (62 Stat. 100) was "specifically to allow for the development of Alaska, both as a tourist and vacation area and commercially and industrially." The bill was not considered by the Congressional Committee on Mining or Public Lands. The statutory purposes of a permit are

to promote "residence, recreation, public convenience, education, industry, agriculture and commerce." On recommending passage of the bill, the Department of Agriculture never referred to mining development, indeed asserted only that

> "The proposed legislation would broaden and make more practicable the authority now included in * * * 16 U.S.C. § 497." Sen. Rep. 899, 80th Cong. 1st Sess.

Neither statute includes mining as a purpose for which a permit was issued. The enumerated purposes "can be fully effectuated through an administration of the occupancy and use of the surface of national forest lands without the development of mineral resources." It is clear that Congress did not intend to authorize the Secretary of Agriculture to develop mines and minerals in Alaskan national forests by this statute for such would work a revolution in the management of mineral lands in Alaska. Not only would the Secretary of the Interior be effectively deprived of his jurisdiction over such mineral lands under the Mineral Leasing Laws and Mining Laws, but the Secretary of Agriculture would have the power to develop mines, a power not heretofore conferred even upon the Secretary of the Interior.

4. *Correction Memorandum No.* 11 *was not issued to anyone, nor was it in form a permit.*

There was no evidence that Corrective Memorandum No. 11 was issued to anyone, much less the Bureau of Public Roads. Testimony showed that it was sent from Juneau to the Supervisor of the Southern Division of the Tongass National Forest "to complete our land records" (Tr. 183).

The 37.5 acre tract was not by virtue of Correction Memorandum No. 11 placed "under the jurisdiction and control of the Department of Commerce." (Tr. 209).

Regulations U-10 and U-11 (Tr. 110-122), the claimed authority for a special use permit under 48 U.S.C. § 341 (62 Stat. 100), have the following requirements which plaintiff failed to show or which plaintiff's own evidence shows were violated:

> "Special use permits * * * shall be in such form and contain such terms, stipulations, conditions and agreements as may be required by the Regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service.
>
> * * *
>
> "Permits will include the usual stipulation in regard to protection of national forest interests and will provide that the permit will terminate if the permittee does not use the premises as contemplated by Reg. U-11.
>
> * * *
>
> "Free special use permits shall be issued with one 'original', one 'duplicate' and one 'ranger's copy' promptly upon the approval of the appli-

> cation. Section 1 of Form 832, if used, shall be deleted and in its place shall appear 'Issued free of charge under authority of Reg. U-11(*)'."

It is clear that the Correction Memorandum No. 11 did not conform to these regulations.

If Correction Memorandum No. 11 is a special use permit under Regulation U-10 and U-11, then all permits for the other uses mentioned in regulations would also bar mineral entries. Such other use permits include cemeteries, churches, cabins for trappers of predatory animals, stockmen, range facilities, campfires, signs, squatters, and taking motion pictures (Tr. 115-121).

If a document as indefinite in its terms and not even designated a use permit can constitute a withdrawal of mineral land from entry under 48 U.S.C. § 341 (62 Stat. 100), then the mining laws no longer have any practical application to forest lands in Alaska. Any document in the files of the Forest Service describing any tract less than 80 acres would constitute such a withdrawal. It is inconceivable that Congress intended such a result. The history of the mining laws, the fact that the national forests are expressly subjected to the mining laws in as broad terms as possible, and that Congress has found it necessary to pass special laws both before and after passage of 48 U.S.C. § 341 (62 Stat. 100) limiting but not abrogating the min-

ing laws in specified areas of designated forests (see p 30-31, supra), all indicate that Congress could not have intended such a document as Correction Memorandum No. 11 to be a withdrawal.

5. *Plaintiff did not rely upon Correction Memorandum No.* 11 *being a permit under* 48 *U.S.C.* § 341, *prior to or during the trial.*

Prior to trial the plaintiff failed to mention the statute now relied upon in its answers to interrogatories specifically requesting it to state every law and regulation under which it purported to act. Not until after the trial was the statute ever mentioned, although several other statutes were mentioned and relied upon prior to and during the trial.

A recent Court of Claims case, *Chemical Recovery Co., Inc. v. United States,* 103 F. Supp. 1012, 1018 (Ct. Ct.) held the United States liable on a contract nothwithstanding a contention raised at the trial that the plaintiff could not recover because it had assigned the contract in violation of the law. The Court said it was influenced in its refusal to apply the statute:

> "* * * by the fact that the Government's reliance upon the statute is a mere afterthought. Though attempting to marshall all available reason for forfeiting the plaintiff's contract this one never suggested itself to the Government's officers until long after they had refused to perform the contract."

In this case the plaintiff attempted to marshall all its grounds for holding deefndant's mineral location void and set up four separate grounds in paragraphs IV, V, VI and VII of the complaint. The complaint was sworn to on October 3, 1951 (Tr. 11). Defendant filed interrogatories on October 26, 1951 (Tr. 21) requesting the plaintiff to specify each law and regulation plaintiff acted under in making the alleged appropriation. Plaintiff's answers to the interrogatories, filed December 5, 1951 (Tr. 27), did not mention the statute now relied upon. At the time of trial, on January 25, 1952, plaintiff amended its complaint by striking out of paragraph IV of its complaint "36 C.F.R. 251.22" and substituted "an order of the Secretary of Agriculture dated February 1, 1926 and regulations of the National Forest Hanual, pages 57-L and 61-L" (Tr. 122) (Pl. Ex. 1 Tr. 99-108). Thus, for a period of four months, from the time of filing the complaint to and through the trial, plaintiff made no mention of the statute upon which the court based its decision. The plaintiff instead relied upon regulations constituting authority for the appropriation claimed in paragraphs IV and VII of the complaint and as authority for the Regional Forester's claimed appropriation under paragraph V by virtue of the general laws relating to the administration of national forests.

Plaintiff's witnesses never referred to Correction Memorandum No. 11 as a permit. "We withdrew it

by Correction Memorandum No. 11" (Tr. 180); "order . . . setting aside thirty-seven and one-half acres" (Tr. 270); and it was "a final order or a final act setting that property aside;" insofar as the Forest Service was concerned (Tr. 270-271).

IIb. *Correction Memorandum No.* 11 *did not withdraw the lands under authority of* 23 *U.S.C.* § 18.

The lower court, in Findings of Fact VII, stated that Correction Memorandum No. 11 was authorized by 23 U.S.C. § 18 (Tr. 61). All of the considerations mentioned with regard to 48 U.S.C. § 341 apply with even greater force to 23 U.S.C. § 18 (42 Stat. 216). That statute provides for a transfer of lands from the United States to a "State Highway Department" to be used "for the right of way of any highway or forest road or as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands or reservations." (Supra p 7-8)

As the lower court found, however, even this authority was transferred from the Secretary of Agriculture to the Secretary of Commerce by 1949 Reorganization Plan No. 7 (63 Stat. 1070) and 1950 Reorganization Plan No. 5, effective May 24, (64 Stat. 1263 (Finding VII, Tr. 61). There was no evidence whatsoever that either the Secretary of Commerce or any person in the Department of Commerce or the Secretary of Agriculture ever proceeded under that act or complied with its requirements.

While the section of the Act quoted is authorization for the tranfer of lands, it is not an authorization for the issuance of permits allowing removal.

Taking of Sand and Gravel from Public Lands for Federal Air Highways (1933), 54 L.D. 294 (p 51, infra), an opinion by the acting solicitor of the Department of the Interior, approved by then Assistant Secretary Oscar L. Chapman, affirmed that

> "There is no law authorizing the removal of gravel from the public domain for public roads or highways, except as provided in the Federal Highway Act. In view of the fact, however, that public roads and highways are a public benefit it has been the policy of this Department to interpose no objection to the removal of such material from the public domain by state and county officers for road construction purposes as long as there is no substantial damage to the property, although a permit specifically granting such privilege cannot be issued."

III

There was no evidence that plaintiff was in actual possession of any identified part of the 37.5 *acre tract, so as to exclude entry and location under the mineral laws.*

The lower court erred in conclusion of Law II in holding that "there was an appropriation and withdrawal of the road and three-acre area included within the 37.5 acres * * * by actual use and possession." This holding affects only a small portion of defendant's claim, but it is not supported by any

evidence showing actual possession at the time of entry or showing use in any defined area at all.

There was much evidence of intermittent use of the 37.5 acre tract by contractors as a source of gravel. A roadway was bulldozed by one contractor (Tr. 202). Another contractor built a log loading ramp in 1949 (Tr. 146, 207), although no one maintained it or apparently used it after he left (Tr. 208).

According to plaintiff's evidence the last use of the 37.5 acre tract started "June 28, 1950 and continu(ed) on through into December of 1950." (Tr. 135). There was no evidence that anyone worked on the 37.5 acre tract in the intervening six months, and not even an attempt to show that anyone was in possession of the tract on June 21, 1951 when defendant made his mineral entry. It is conceded "that defendant, H. F. Schaub, located such claim openly and peaceably" (Finding of Fact IV (Tr. 59).

There was, therefore, no actual use or possession of the 37.5 acre tract at the time of defendant's mineral entry, nor had there been any such use or possession for six months prior to his entry.

Plaintiff was and is in constructive possession of all the Tongass National Forest. Plaintiff may permit the use of its resources by others. Such permissive use, however, does not abrogate the mining

laws. As was pointed out in *United States v. Tichenor,* 12 Fed. 415:

> "It may also be admitted that General Hitchcock could direct his subalteran, engaged in military operations in Oregon, to establish and occupy a camp or fort on the public lands therein, or that the latter might do so under the circumstances without any direction from the former, but such use or occupation would not have the effect to impart any special character to the land or constitute it a reservation for any purpose, within the purview of the donation act. It would still remain open to the claim of any qualified settler under the act and as soon, at least, as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler."

Actual possession of an area may bar a subsequent entry or location based upon an act of trespass, force, fraud, or clandestine entry. A mineral location may, however, be instituted upon land actually in the possession of another provided the entry is made peaceably. *Cole v. Ralph,* 252 U. S. 286, 40 S. Ct. 321.

Of course, had there been actual occupation of any particular area and a marking upon the ground of some relatively permanent improvement the rule would be otherwise. When telephone lines, road, trials, bridges or government buildings have been constructed with funds appropriated by Congress, the lands actually occupied are devoted to public use and are deemed withdrawn from entry by Act of Congress. *United States v. Fitzgerald,* 15 Pet.

407, 419, *Wilcox v. Jackson,* 13 Pet. 512, *Lyders v. Ickes,* 84 F. (2d) 232 (Ct. App. D.C.)

An opinion, entitled "Roads, Trails, Bridges, etc., in National Forests — Exceptions in Patents" 44 L.D. 513 is the source of that rule of law, but points out that

> "* * * a mere preliminary survey, which might or might not be later followed by construction, is not an appropriation of the land to the public use. It would seem that *some action indicating upon the ground itself that the tract had been devoted to the public use is necessary*—such as staking the area to be retained by the United States * * *." (Italics added.)

It is difficult to conceive that holes in the stream bed left by contractors could constitute actual occupation of that area by the United States, particularly when gravel washes down the stream bed and fills up the pits as they are dug (Tr. 155). A road bulldozed "with a very small amount of work" (Tr. 202) and a log loading ramp never used after 1949 (Tr. 208), both of which were constructed by private contractors for their own use, are not the equivalent of permanent government improvements nor do they convert defendant's entry into a trespass. Certainly the evidence failed to identify any specific area with the particularitly of proof re-

quired by *Wilcox c. Jackson,* 13 Pet 498, 513, and *U.S. v. Tichenor,* 12 Fed. 415.

IV.

The court erred in excluding regulations and rulings of the Forest Service.

At the time of trial, as earlier pointed out, plaintiff did not rely upon Correction Memorandum No. 11 as a permit under 48 U.S.C. § 341 (62 Stat. 100). Instead, plaintiff relied upon a 1940 classification of a 91.13 acre tract as a recreation area (Par. 4 of the complaint, Tr. 4). Defendant wished to introduce Regulations U-1, U-2 and U-3, Circular No. U-220 and certain letters to show that such a classification was a device to prevent mineral entry which the Forest Service itself had abandoned. Secondary purposes were to show that a public land order is not effective until published, that Correction Memorandum No. 11 was not in form a permit or for an authorized purpose and that the Forest Service had actually adopted the different and inconsistent procedure of withdrawal by public land order. The regulations were material and relevant because they outlined in detail the steps to be taken and the formal written request actually made by the Forest Service. The lower court could have taken judicial notice of these documents notwithstanding its refusal to admit them in evidence. However, "Defendant's offer of the exhibits for identi-

fication was also refused." (Tr. 72). Thus, there was nothing in the record of which the lower court could take judicial notice. The lower court did not refer to the exhibits in its decision or findings, except to the extent of holding that the public land order related back to the formal written request made by the Forest Service, although it had refused to admit that request into evidence.

No question was or can be raised as to the authenticity of the regulations and formal request for withdrawal as contained in the transcript (Tr. 75-92).

The courts of the United States will take judicial notice of the rules, orders and decisions of the executive departments of the government.

United States v. Penn Foundry & Mfg. Co., 337 U. S. 198, 69 S. Ct. 1009, rehearing denied, 338 U.S. 840, 70 S. Ct. 32 (letter and memorandum by the Navy Department on policy with regard to contracts); *Lilly v. Grand Trunk Western R. Co.,* 317 U.S.481, 63 S.Ct. 347 (I.C.C. safety standards set under the Boiler Inspection Act); *Tucker v. Texas,* 326 U.S. 517, 66, S.Ct. 274 (Regulations of the Federal Public Housing Authority); *Thornton v. United States,* 271 U.S. 414, 420, 46 S.Ct. 585 (quarantine and cattle dipping regulations of the Bureau of Animal Husbandry issued by the Secretary of Agriculture); *Cosmos Exploration Co. v. Gray Eagle Oil Co.,* 190 U.S. 301, 23 S.Ct. 692 (rules and regu-

lations of the Land Department regarding sale or exchange of public lands); *Caha v. United States,* 152 U.S. 211, 14 S.Ct. 513 (rules and regulations of the Department of the Interior with respect to contests before the land office); *Lyon Mill Co. v. Goffee & Carkener,* 46 F. (2d) 241, 246 (C.C.A. 10th) (designation by the Secretary of Agriculture of a contract market within the Grain Futures Act).

Judicial notice may be taken of a letter, *Bowles v. United States,* 319 U.S. 33, 35-36, 63 S.Ct. 912, rehearing denied, 319 U.S. 785, 63 S.Ct. 1323, (where the court relied upon a letter by the Director of Selective Service deciding an appeal where the letter was printed in the brief and "No question has been raised as to the authenticity of this copy.") cf., *United States v. Penn Foundry & Mfg. Co., supra.*

A circular was considered by the Supreme Court in *National Labor Relations Bd. v. E. C. Atkins & Co.,* 331 U.S. 398, 406, 407, 67 S.Ct. 1265, and the court pointed out in a footnote:

> "2. Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it."

These regulations and letter decision, together with the opinion of the Solicitor of the Department

of Agriculture (supra, p 31) and opinions of the Secretary of the Interior (supra, p 41), were and are obviously relevant and material under the familiar rule that:

> "* * * if the question be considered * * * as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early date in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons * * *."

Heath v. Wallace, 138 U.S. 573, 11 S.Ct. 380 (1891) (considering land office decisions and rulings on the question of what were swamp lands and the requirements of a survey determining a grant under that act.

CONCLUSION

Throughout the trial defendant was prepared to meet and sustain the burden of proof required under the mining laws to show that defendant had made a valid entry upon sand and gravel under the mining laws of the United States, i.e., that "by reason of accessibility, *bona fides* in development, proximity to market, and existence of present demand" the deposit was of such value that it could be mined,

removed and disposed of at a profit. Such has been the long established rule regarding sand and gravel mining claims (54 L.D. 294, p 52, infra), *Ickes v. Underwood,* 141 F. (2d) 546 (Ct. App. D.C.), cert. den. 323 U.S. 713, and until the decision of the lower court, the only basis upon which mining claims had been set aside. The long established rule was and is well able to eliminate fraudulent mining claims, 54 L.D. 294, *U.S. v. Lavenson,* 206 Fed. 755 (D.C. Wash.), *U.S. v. Lillibridge,* 4 F. Supp. 204 (D.C. Cal.), *U.S. v. Mobley,* 45 F. Supp. 407 (D.C. Cal.)

A valuable claim, valid under the mining laws, has been set aside on novel grounds never before adopted by any court which, if sustained, might cloud the title or invalidate mining claims throughout the country and result in the withdrawal of the vast area of Alaska lands in National Forests from the mining laws at the pleasure of Regional Foresters or subordinate officers of the Forest Service. It would overturn administrative practice and procedure adopted by the Forest Service and the Department of the Interior. The precedence of the mining laws over National Forest lands and the jealous scrutiny of executive withdrawals have been too firmly established by Congress and the courts to allow such a revolutionary change through judicial interpretation of such a document as Cor-

rection Memorandum No. 11. The judgment of the lower court should be reversed.

Respectfully submitted,

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APPENDIX

Public Land Order 734

(16 *Fed. Reg.* 7329, *published July* 26, 1951)

Alaska

Reservation of lands within Tongass National Forest as a Public Service Site.

By virtue of the authority vested in the President by the act of June 4, 1897 (30 Stat. 34, 36; 16 U.S.C. 473), and otherwise, and pursuant to Executive order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the following described tract of public land within the Tongass National Forest in Alaska is hereby withdrawn from all forms of appropriation under the public-land laws, including the mining laws but not the mineral leasing laws, and reserved for the use of, and administration by the Forest Service, Department of the Interior, as the Whipple Creek Public Service Site:

Beginning at a point on the southeast boundary of U. S. Survey No. 2802 from which corner No. 1 of said survey bears N. 30° E., 200 feet, thence by metes and bounds:

N. 30° 00′ E., 817.0 feet to corner No. 6 of U.S.S. 2803;

N. 46° 30′ E., 860.0 feet;
S. 43° 30′ E., 1,080.0 feet;
S. 46° 30′ W., 1,160.0 feet;
S. 83° 57′ W., 548.0 feet

to PC566 + 57.4 on southeast edge of the right-of-way of North Tongass Highway;

Southerly and westerly, 353.0 feet parallel to and 33 feet from the centerline of North Tongass Highway;

N. 12° 00′ W., 437.0 feet to point of beginning.

The tract described contains approximately 37.5 acres.

This order shall take precedence over, but not otherwise affect, the existing reservation of the lands for national-forest purposes.

OSCAR L. CHAPMAN,
Secretary of the Interior

July 20, 1951
(I.R. Doc. 51-8572; Filed, July 25, 1951; 8:46 a.m.)

Executive Order 9337
(8 Fed. Reg. 5516 April 28, 1943)

Authorizing the Secretary of the Interior to Withdraw and Reserve Lands of the Public Domain and Other Lands Owned or Controlled by the United States.

By virtue of the authority vested in me by the act of June 25, 1910, Ch. 421, 36 Stat. 847 [43 U.S.C. §141], and as President of the United States, it is ordered as follows:

Section 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of the public domain and other lands owned or controlled

by the United States to the same extent that such lands might be withdrawn or reserved by the President and also to the same extent, to modify or revoke withdrawals or reservations of such lands. *Provided,* That all orders of the Secretary of the Interior issued under the authority of this order shall have the prior approval of the Director of the Bureau of the Budget and the Attorney General, as now required with respect to proposed Executive Orders by Executive Order No. 7298 of February 18, 1936 and shall be submitted to the Division of the Federal Register for filing and publication: *Provided, further,* That no such order which affects lands under the administrative jurisdiction of any executive department or agency of the government, other than the Department of the Interior, shall be issued by the Secretary of the Interior without the prior concurrence of the head of the department or agency concerned.

Section 2. This order supersedes Executive Order No. 9145 of April 24, 1942 entitled "Authorizing the Secretary of the Interior to Withdraw and Reserve Public Lands."

FRANKLIN D. ROOSEVELT

The White House,
April 24, 1943

F.R. Doc. 43-6460; Filed, April 26, 1943, 3:15 p.m.

SAND AND GRAVEL AS A MINERAL

TAKING OF SAND AND GRAVEL FROM PUBLIC LANDS FOR FEDERAL AID HIGHWAYS

(Excerpts from Opinion, September 21, 1933)

(54 L.D. 294)

* * *

In *Layman et al. v. Ellis, supra,* the Department held (syllabus) that—

> "Gravel is such substance as possess economic value for use in trade, manufacture, the sciences, and in the mechanical or ornamental arts, and is classified as a mineral product in trade or commerce.
> Lands containing deposits of gravel which can be extracted, removed and marketed at a profit are mineral lands subject to location and entry under the placer mining laws."

The reasons for the above-stated conclusions were elaborately set forth in the opinion in the case and need no restatement here. It suffices to observe that upon examination of this case it appears that the Department followed and applied the principle which it had applied in other cases there cited, involving the locality of other kinds of commonplace stones used for construction and manufacturing purposes—the same principle that had been consistently applied by the courts, namely, that in the solution of the question whether lands containing a given mineral substance were subject to location

and purchase under the mining laws, the test was the marketability of the product.

It was pointed out that there was no logical reason for discriminating between sand and gravel, if marketable at a profit, and other low grade deposits of wide distribution, used for practically the same or similar purposes, which also met the same test; that the distinctions assigned in the Zimmerman case for excepting sand and gravel from the rule were unsubstantial and that the doctrine of that case had been vigorously criticized by the leading text-writers on the mining law.

The main objection that appeared to the application of this principle to such commonplace substances as sand and gravel, was that it would render facile the acquirement of title to numerous areas containing sand and gravel for other purposes than mining, but this objection may be urged with as much reason against other mineral substances of wide occurrence and extent which under the same limitations and qualifications are locatable and enterable under the mining law, such as, for example, limestone, marble, gypsum, and building stone. Furthermore, the objection mentioned is not of much force when it is considered that the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is

of such value that it can be mined, removed and disposed of at a profit. Cases have been frequent where the Department has refused patent to lands containing the mineral substances last mentioned in abundance, where the evidence as to the value of the deposit was insufficient or lacking. No reason is seen, therefore, to overrule the case of *Layman et al. v Ellis*. It follows that sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly and properly located under the mining law as a placer claim, may be lawfully disposed of for use, not only on Federal aid highways, but for other purposes.

LAYMAN ET AL. v. ELLIS

Decided October 16, 1929

(52 L.D. 714)

(Excerpts from Opinion)

* * *

Bad faith in making the entry not being established, the question arises whether the entry or any part thereof was invalid because of the existence of gravel deposits thereon admittedly valuable. The question is not new. In *Zimmerman v. Brunson, supra,* it was held (syllabus) that—

> "Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land within which they are found mineral in character within the meaning of the

> mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes."

Although the commissioner held that he was governed by the rule in *Zimmerman v. Brunson, supra,* he was of the opinion that valuable deposits of gravel should be held subject to appropriation under the mining law for the reason that they are valuable mineral deposits, and that the rule in that case should be modified.

Data are presented contained in publications of the Geological Survey, entitled "Mineral Resources of the United States," as evidence of the marked increase in production, use and price of this commodity since 1909, when the decision in the *Zimmerman case* was rendered. Supplementing the data presented by the commissioner, this series of publications show that in 1909 there was sold and used in the United States 23,382,904 tons of gravel of all kinds of the value of $5,719,886, of which amount California produced 914,035 tons, valued at $169,476 (1910, Part 2, p. 602); that in 1927 the combined tonnage of building, paving and railroad ballast gravel used and sold in the United States was 103,865,930 tons, valued at $51,238,388. Of this amount California produced 2,460,072 tons of paving gravel alone of the value of $1,177,086 (1927, Part 2, pp. 160-181). The commissioner's statement

also appears to be correct that "according to these tables in 1927, California produced over seven times the amount it did in 1909, the value of the 1927 production being over 26 times the value in 1909." The tables for the year 1927 also show an average value throughout the United States of all gravel sold of 67 cents per ton. A noteworthy feature in recent years is the growth in size and number of large plants producing washed or otherwise cleaned gravel and crushed stone of standardized grading and size, bringing about keen competition between gravel and crushed stone for wide market areas in contrast to the strictly local market of a few years ago, this competition developing controversies and discussion as to zone and commodity freight rates. (1925, Mineral Resources, Part 1, p. 47). In these publications gravel and sand have uniformly been classed as a mineral resource. They are also included in the list of useful mineral supplies (U.S. Geological Survey Bulletin No. 666).

From what has been stated there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts.

The *Zimmerman case* quotes the rule in *Pacific Coast Marble Co. v. Northern Pacific R.R. Co. et al.*

(25 L.D. 233), frequently since applied as a test of the mineral character of land, reading as follows (p. 244):

> "Whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substance, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws."

But it was nevertheless attempted to take the deposit under consideration from the rule, *first,* because the standard authorities have failed to classify sand and gravel as mineral, and *second,* because the deposit had no special property or characteristic giving it special value, and *third,* its chief value arose from industrial conditions peculiar to the locality where the deposit was found.

The deposit here is characterized as beach gravel. Gravel is variously defined as "fragments of rock worn by the action of air and water larger and coarser than sand" (Glossary of the Mining and Mineral Industry, U.S. Geological Survey Bulletin No. 95), as "more or less rounded stones and pebbles often intermixed with sand" (28 C.J. 824), as "sand fragments of mineral, mainly quartz" (Bayley on Mineral and Rock, p. 202). Many of the beach pebbles are composed largely of quartz, because it is the most common mineral which physically and

chemically can resist the wear of wave action. Diller, Education Series of Rock Specimens (U.S. Geological Survey Bulletin No. 150, p. 57). The distinction between sand and gravel is largely one of gradation in size. (Item 59). As gravel is not composed always of the same mineral substances, it would not be expected that gravel would appear in a strict mineralogical classification based on definite chemical composition, but examination of the decisions of the department and the courts disclose that questions whether given substance is locatable or enterable under the mining law are not resolved solely by the test of whether the substance considered has a definite chemical composition expressible in a chemical formula. Such a criterion would exclude a number of mineral substances of heterogeneous composition that have been declared to be subject to disposition under the placer mining law, for example, guano, granite, sandstone, valuable clays other than brick clay, which may be made up of a number of minerals and not always the same minerals.

In Lindley on Mines, Section 98, after review of the adjudicated cases and rulings of the department, deductions, which seem warranted, are made as to when the mineral character of public land is established. It is stated—

"The mineral character of the land is estab-

lished when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

"And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it."

That valuable gravel deposits fall within categories (b) and (c) of Mr. Lindley can not be disputed.

Good reason also exists for questioning the statement that gravel has no special properties or characteristics giving it special value. While the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state.

As to the third ground for exclusion in the *Zimmerman case,* it has not been shown that the gravel deposits in this case derive their value from the proximity between place of production and use, and as heretofore indicated gravel is generally recognized as having special characteristics that render it valuable generally in the mechanical arts. The conclusion, hardly justified when the decision in the *Zimmerman case* was rendered, that the value shown was one arising chiefly from exceptional and peculiar conditions in the locality where the deposit in question was found, is not warranted under present conditions.

In *Northern Pacific Railway Co. v. Soderberg* (188 U.S. 526, 534) it was held that the overwhelming weight of authority was to the effect that mineral lands include not merely metalliferous minerals, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture, and the opinion quotes with approval certain observations in *Midland Railway v. Checkley* (L.R. 4 Eq. 19), reading—

> "Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is *gravel,* marble, fire clay, or the like, comes within the word

'mineral' when there is a reservation of the mines and minerals from a grant of land."

. . . . . .

In *Loney v. Scott* (122 Pac. 172) the Supreme Court of Oregon held that building sand worth 50 cents per cubic yard, and marketable in large quantities, as shown by the Director of the Geological Survey in his Reports of Mineral Resources, was mineral land and subject to location under the placer mining law, and that a patent issued to a railroad company under its place land grant carried no title to such deposits then known to be embraced in a placer mining claim.

The Secretary of the Treasury has held that gravel bought as ballast is entitled to free entry as crude mineral. (25 T.D. 627) Applying the rule in the *Pacific Coast Marble Company case, supra,* the department has held that land of little value for agricultural purposes, but which contains extensive deposits of volcanic ash, suitable for use in the manufacture of roofing material and abrasive soaps and having a positive commercial value for such purposes is mineral land not subject to disposition under the agricultural laws (*Bennett et al. v. Moll,* 41 L.D. 594); that trap rock particularly suitable, and profitably marketable as railroad ballast, is, when the land in which it is contained is chiefly valuable for such, a valuable mineral deposit (*Stephen E. Day, Jr., et al.,* 50 L.D. 489); that am-

phibole schist, particularly resistant to the action of water, occurring in proximity to the place of use, and with easy facilities for its transportation, and marketable at a profit for use in the building of a local jetty, was enterable under the mining law (Lee Davenport *et al.,* decided March 20, 1926, unreported); that deposits of fractured granite not serviceable as building stone suitable for rip rap on breakwaters and embankments and useful as railroad ballast and road material, which could be quarried and delivered at a profit and taken from land of no agricultural value, was subject to disposition under the mining law (Charles F. Guthridge, A. 11785, decided August 3, 1928, unreported).

It seems apparent in the *Zimmerman case* and cases based on the same reasoning that the rule in the *Pacific Coast Marble Company case* was not followed, but disregarded on unsubstantial grounds. It has been vigorously criticized by leading text writers on the mining law. (See Lindley on Mines, section 424; Snyder on Mines, section 124). There is no logical reason in view of the latest expressions of the department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can

be extracted, removed and marketed at a profit. The rule in *Zimmerman v. Brunson* will therefore no longer be followed but is overruled.

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